FILED
MAY 10 1993
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No. 92-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY,
a Delaware corporation,
Petitioner,
v.

ROBERT B. REICH, Secretary of Labor,
United States Department of Labor, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 24, 1992
CERTIORARI GRANTED MARCH 8, 1993

52 PP

EDITOR'S NOTE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 91-0050

Case Filed 03-11-91

THUNDER BASIN COAL COMPANY

v.

LYNN MARTIN, as Secretary,
United States Department of Labor, *et al.*

RELEVANT DOCKET ENTRIES

Date	Docket No.	Proceedings
03/11/91	1	VERIFIED COMPLAINT for declaratory judgment and injunctive relief
03/11/91	2	MOTION for issuance of a temporary restraining order
• • •		
03/13/91	6	deft Secretary of Labor, Mine Safety & Health Administration's RESPONSE to motion for TRO
• • •		
03/13/91	8	brief in support of motion for issuance of a TRO and preliminary injunction
03/14/91	9	REPLY to Secretary of Labor
• • •		
03/14/91	11	Deft's MOTION to dismiss
• • •		
03/21/91	14	ORDER granting preliminary injunction; ordered that defts are hereby enjoined from enforcing 30 C.F. R. Part 40 against pltf until further order from this Court; ORDERED that pltf shall forthwith post a bond with this court's registry in the amount of ($1,000) unsecured. (cab) mld 3-22-91

Date	Docket No.	Proceedings
03/22/91	15	ANSWER BRIEF in opposition to MSHA's motion to dismiss
• • •		
03/29/91	—	TRANSCRIPT of motion for temporary restraining order
• • •		
04/25/91	22	ANSWER of defts Secretary of MSHA
• • •		
05/20/91	25	ORDER denying motion to dismiss. (cab) mld 5/20/91
05/20/91	26	NOTICE of appeal by defts of order granting preliminary injunction entered on 3/21/91
• • •		

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-8029

Filed: 5/31/91

THUNDER BASIN COAL

v.

MARTIN, *et al.*

Appeal from United States District Court
for the District of Wyoming

RELEVANT DOCKET ENTRIES

Date	Docket No.	Proceedings
05/31/91	1	[514671] Civil case docketed. Preliminary record filed. Transcript order form due 6/10/91 for C. Frederick Cole pursuant to R.42.1 Docketing statement due 6/10/91 for Mine Safety and, for William Holgate, for William J. Tattersall, for LABR, for Lynn Martin Notice of appearance due 6/10/91 for Richard A. Stacy, for Margaret A. Miller, for Edward P. Clair, for Robert P. Davis, for Colleen A. Geraghty, for Thomas A. Nicholas, for Charles W. Newcom (lwb) [91-8029]
• • •		

Date	Docket No.	Proceedings
10/04/91	26	[547735] Appellant's brief filed by Lynn Martin, LABR, William J. Tattersall, William Holgate, Mine Safety and. Original and 7 copies. c/s: y. Served on 10/2/91 Oral argument? Y., Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 11/4/91 for Thunder Basin (lwb) [91-8029]
11/04/91	27	Appellee's brief filed by Thunder Basin. Original and 7 copies. c/s: y. Served on 11/4/91 Oral Argument? n. Appellant's optional reply brief due 11/21/91 for Lynn Martin (kas) [91-8029]
11/29/91	29	[556696] Appellant's reply brief filed by Lynn Martin, LABR, William J. Tattersall, William Holgate, Mine Safety and. Original and 7 copies. c/s: y (jtp) [91-8029]
12/20/91	32	[560564] Appellant's supplemental authority filed by Lynn Martin, LABR, William J. Tattersall, William Holgate, Mine Safety and. Original and 3 copies. c/s: y (jtp) [91-8029]
01/06/92	33	[562441] Hearing set for March 1992 Session, at Denver. (sls) [90-4192 91-1029 91-1114 91-1310 91-3028 91-8029 91-9010]
03/10/92	35	[578338] Case argued and submitted to Judges Logan, Tacha, Cook. (sls) [91-8029]
03/19/92	38	[580945] Appellee's supplemental authority filed by Thunder Basin. Original and 4 copies. c/s: y (jtp) [91-8029]
• • •		

Date	Docket No.	Proceedings
07/20/92	42	[608062] Terminated on the Merits after Oral Hearing; Vacated and Remanded; Written, Signed, Published. Logan, authoring judge; Tacha; Cook. [91-8029] (Motion to stay and consolidate appeal with 92-8030 is denied.) (mt) [91-8029]
07/31/92	43	[610921] Petition for rehearing en banc [91-8029] filed by Thunder Basin in 91-8029. Original and 12 copies. c/s: y (kc) [91-8029]
• • •		
08/28/92	46	[616834] Order filed by Judges Logan, Tacha & Cook denying Petition for rehearing en banc [610921-1] (mt) [91-8029]
• • •		
12/04/92	53	[638401] Order filed by Judges ENBANC the order of 8/28/92 is reissued nunc pro tunc to show the en banc panel. Parties served by mail. (mt) [91-8029]
01/19/93	54	[647818] Petition for writ of certiorari filed on 11/24/92 by Appellee Thunder Basin in 91-8029. Supreme Court Number 92-896. (lwb) [91-8029]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 91 CV 0050B

THUNDER BASIN COAL COMPANY,
Plaintiff,

v.

LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION; MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR,
Defendants.

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

[Filed March 11, 1991]

COMES NOW Thunder Basin Coal Company ("Thunder Basin"), by and through its attorneys, and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This action is for declaratory and injunctive relief. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 2201-2202 and 28 U.S.C. § 1331 because this controversy arises under the laws of the United States, more particularly, under the Labor-

Management Relations Act, as amended, 29 U.S.C. § 141 *et seq.* ("LMRA"), and the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 *et seq.* ("Mine Act"), and the Constitution of the United States.

2. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (e) in that the claims in this action arise in this judicial district.

II. PARTIES

3. Plaintiff Thunder Basin is a corporation duly incorporated under the laws of the State of Delaware, with its principal place of business located twelve miles southeast of Wright, Wyoming, mailing address P.O. Box 406, Wright, Wyoming 82732.

4. Defendant Lynn Martin is the Secretary of the United States Department of Labor. The Mine Safety and Health Administration ("MSHA") is an Administration within the United States Department of Labor, which was established by Section 302(a) of the Mine Act, which Administration enforces the Mine Act in behalf of the Secretary of Labor. Defendant William J. Tattersall is the Assistant Secretary of Labor for Mine Safety and Health and thus is in charge of and directs personnel within MSHA. Defendant William Holgate is the District Manager of Coal Mine Safety and Health, District 9, of MSHA. Thunder Basin's mines are located in District 9 and Mr. Holgate directs enforcement activity in District 9. Hereafter Defendants are collectively referred to as MSHA or Defendants.

III. NATURE OF DISPUTE

5. MSHA is seeking to require Thunder Basin to waive its rights under the LMRA and to recognize the United Mine Workers of America ("UMWA") as a representative of Thunder Basin employees, even though those employees have previously rejected the UMWA as a representative in a secret ballot election under the LMRA by a vote of 307-56. If no relief is awarded in this action,

MSHA will force Thunder Basin to either waive its statutory rights under the LMRA or incur civil and perhaps criminal penalties (for individuals and the corporation) for violating the Mine Act.

IV. STATEMENT OF FACTS

A. *Thunder Basin*

6. Thunder Basin is a coal mining company. It operates the Black Thunder Mine, which is the largest surface coal mine in the United States, and the Coal Creek Mine. The Black Thunder Mine is located approximately twelve miles southeast of Wright, Wyoming. The Coal Creek Mine is located approximately twenty-five miles northeast of Wright, Wyoming.

7. This dispute involves the Black Thunder Mine. That mine began production in 1977. The Black Thunder Mine currently has approximately 500 employees.

8. Since it began operations in 1977, the Black Thunder Mine, as the Coal Creek Mine, has at all times been a non-union mine. Thunder Basin has had one union election, pursuant to the provisions of the LMRA. That election occurred in late 1987. At that time, the UMWA sought to represent the production and maintenance employees at the Thunder Basin's Black Thunder and Coal Creek Mines. Thunder Basin employees rejected the UMWA by a vote of 307-56. Thus both mines remained and continue to this day to be non-union mines. Since that election, no additional petitions for representation of employees at the Thunder Basin's mines, pursuant to the applicable provisions of the LMRA, 29 U.S.C. § 159, have been filed by the UMWA or any other union.

B. *LMRA, Mine Act—Conflict in Provisions*

9. Before a union can represent employees under the LMRA, the union must comply with the detailed substantive and procedural rules established by the National

Labor Relations Board under the LMRA. Congress has clearly stated the purpose and policy of the LMRA. It is, among other things, "to prescribe the legitimate rights of both employees and employers in their relations" with each other. 29 U.S.C. § 141(b).

10. The National Labor Relations Board has set, among other things, procedures for determining whether an election will be held among employees, what employees will be eligible to vote, how elections will be conducted, what election campaign tactics are appropriate, and how disputes as to the representative status of a union are to be addressed. *See* National Labor Relations Board Case Handling Manual (Part 2), Representation Proceedings.

11. Case law of the National Labor Relations Board and the courts further addresses when, if ever, a union may gain access to company property. While a union representative who is not an employee often has access to company property after an election in conjunction with the pursuit of the union's duty to bargain collectively in behalf of employees, such a union representative is never allowed to go into working areas (as it would in a mine safety inspection under the Mine Act) during the election process or as a part of organizing efforts.

12. Under LMRA election procedures, employers are allowed to refuse to disclose any information regarding company operations or practices to a union during an election campaign.

13. Under the Mine Act, MSHA has promulgated regulations, 30 C.F.R. Part 40, which provide for the designation of a "Representative of Miners." Exhibit 1 hereto. That term is defined as "[a]ny person or organization which *represents* two or more miners at a coal or other mine for purposes of the Act." 30 C.F.R. § 40.1 (b)(1) (emphasis added).

14. In contrast to LMRA election procedures, once an organization is determined to be a Representative of

Miners under the Mine Act, it is entitled to substantial participation in the affairs of a mining company. A Representative of Miners may designate persons to accompany an inspector on mine property during an inspection and participate in pre- and post-inspection conferences. 30 U.S.C. § 813(f). It may request inspections. 30 U.S.C. § 813(g). It may initiate proceedings to modify the application of regulations at the mine it "represents" and participate as a party in those proceedings. 30 C.F.R. Part 44. It is to be sent copies of all citations, orders, notices or decisions which MSHA gives the mine operator. 30 U.S.C. § 819(b). It is to receive and can comment upon a mine operator's training plans. 30 C.F.R. §§ 48.3, 48.23. It can challenge the issuance, modification or termination of certain enforcement actions taken against a mine operator by MSHA and can contest the reasonableness of the time period MSHA gives a mine operator to correct an alleged violation of the Mine Act or MSHA's regulations. 30 U.S.C. §§ 815(d), 817(e). Federal Mine Safety and Health Review Commission rules allow a Representative of Miners to participate as a party, with discovery rights, etc., in proceedings under the Mine Act. 29 C.F.R. § 2700.4.

15. A union, such as the UMWA, which has never been certified pursuant to the LMRA as a collective bargaining representative of Thunder Basin employees, cannot "represent" those employees under 30 C.F.R. § 40.1 (b)(1). This is particularly true where Thunder Basin employees have specifically and overwhelmingly (307-56) rejected the UMWA as their representative, pursuant to the election procedures of the LMRA.

16. Notwithstanding this overwhelming rejection of the UMWA by Thunder Basin employees, MSHA persists in the position that the UMWA is a proper Representative of Miners under 30 C.F.R. Part 40 and that Thunder Basin will violate the Mine Act if it does not accept MSHA's interpretation. In taking this position in

conflict with the LMRA, MSHA is acting in excess of its statutory authority.

17. Under the provisions of the Mine Act, as amended, if a mine operator violates the Act, or a regulation thereunder, the mine operator *must* pay a civil penalty which can be up to $50,000. 30 U.S.C. § 820(a), as amended by the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508. Moreover, if a citation is issued and the mine operator refuses to immediately acquiesce in MSHA's position, the mine operator may be subjected to additional civil penalties of up to $5,000 per day for its failure to acquiesce in MSHA's interpretation of the Mine Act. 30 U.S.C. § 820(b), as amended by the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101-508. Further, both the mine operator and corporate directors, officers, or agents individually, may be subjected to criminal penalties involving imprisonment of up to one year and fines (up to $100,000 for the individual and $200,000 for the corporation), as set forth in 18 U.S.C. § 3571. 30 U.S.C. § 820(c) and (d).

18. Given these requirements of the Mine Act, Thunder Basin has only two options. It must either A) acquiesce in the interpretation of MSHA that the UMWA can properly be a representative of Thunder Basin miners, notwithstanding the overwhelming rejection of the UMWA by Thunder Basin employees in an election conducted by the National Labor Relations Board, or B) refuse to accept MSHA's position, in which case it will i) receive a citation for failure to accept the interpretation, and then ii) be directed to accept MSHA's interpretation or iii) have to accept the risk of substantial civil and criminal penalties, including a daily penalty to the maximum allowable by the law ($5,000 per day).

C. *Events at Thunder Basin Leading to Claim*

19. On October 25, 1990, Thunder Basin received the document attached hereto as Exhibit 2, which document purported to designate the UMWA as a representa-

tive of the Black Thunder Mine employees under 30 C.F.R. Part 40.

20. The UMWA is actively seeking to unionize the Black Thunder Mine. This action by the UMWA in seeking designation as a Representative of Miners is intended to further those efforts. Attached as Exhibit [sic] 3 through 6 are documents distributed by the UMWA regarding UMWA organizing efforts and the use of 30 C.F.R. Part 40 in connection with those organizing efforts.

21. By letter dated October 26, 1990, Exhibit 7, Thunder Basin returned the designation to Mr. William Holgate, District Manager of District Nine, Coal Mine Safety and Health, of MSHA, because the designation was invalid on its face.

22. On October 30, 1990, Thunder Basin received a copy of Exhibit 8 from the UMWA, addressed to Mr. Holgate, regarding 30 C.F.R. Part 40.

23. On November 28, 1990, Thunder Basin received a single page, Exhibit 9, in which it appeared that a portion of the first page of Exhibit 2 had been marked out with new information being added.

24. By letter dated November 29, 1990, Exhibit 10, to Mr. Holgate, Thunder Basin renewed its objection to the impropriety of the action by the UMWA. That letter specifically advised MSHA of the prior rejection of the UMWA by Thunder Basin employees and of the fact that the UMWA is improperly using MSHA procedures to try to further union organizing activities.

25. Thunder Basin had no further contact from MSHA with regard to these issues until late February 1991. At that time, as described in Exhibit 11, informal discussions occurred between Mr. W. L. Craig, Manager, Health and Safety, for Thunder Basin, and Mr. Joe Pavlovich, Sub-District Manager of District 9 Coal Mine Safety and Health of MSHA. In both the oral communication, and Exhibit 11, Thunder Basin indicated, for the reasons detailed in Exhibit 10, it had not posted the UMWA designation because it had not received a complete designation of the UMWA under 30 C.F.R. Part 40 and the UMWA could not "represent" Thunder Basin employees under 30 C.F.R. Part 40.

26. On March 7, 1991, an MSHA Inspector, Jimmy Giles, and an MSHA Field Supervisor, Joe Ferguson, went to the Thunder Basin's Black Thunder Mine. At that time they asked whether Thunder Basin had posted the designation of the UMWA to be a miners' representative of Thunder Basin employees.

27. Mr. Craig advised the representatives of MSHA that Thunder Basin had not received any response from MSHA to Thunder Basin's November 29, 1990 letter, Exhibit 10. He further advised them that Thunder Basin had never received a complete designation form properly identifying the mine and that Thunder Basin did not believe the UMWA could properly "represent" its employees.

28. Messrs. Craig, Giles and Ferguson then called Mr. Pavlovich, using a speaker phone. In that conversation, Mr. Pavlovich indicated a letter from Mr. Holgate, in response to Exhibit 10, would be sent to Thunder Basin forthwith. Mr. Pavlovich said the letter would tell Thunder Basin to post and thereby honor the disputed UMWA designation.

D. *Harm to Thunder Basin*

29. When Thunder Basin receives the letter from MSHA responding to Exhibit 10, if Thunder Basin does not post and honor the UMWA designation, or, if Thunder Basin posts the designation, but later refuses to honor it by, for example, disallowing a UMWA designated person to accompany an MSHA inspector on an inspection of Thunder Basin's property, MSHA will require Thunder Basin to immediately comply with MSHA's interpretation. Thunder Basin will then be forced by

MSHA either A) to waive its statutory protections under the LMRA and to accept MSHA's position that the UMWA can represent Thunder Basin employees, notwithstanding the overwhelming rejection of the UMWA by Thunder Basin employees, or B) to receive a citation and to accept the liability for civil and criminal penalties as described above.

30. The risk of daily penalties if Thunder Basin did not waive its LMRA rights during any litigation on the citation is not hypothetical. The Jacobs Ranch Mine of Kerr-McGee Coal Corporation located immediately adjacent to Thunder Basin's Black Thunder Mine objected to MSHA's interpretation on these very issues. As described in the attached Exhibits 12 to 16, which on information and belief Thunder Basin states are a part of the record in administrative litigation involving the Jacobs Ranch Mine, MSHA enforcement officials took the position there that unless Kerr-McGee acquiesced in MSHA's interpretation during the pendency of its administrative litigation and posted a UMWA designation, the maximum allowable daily penalties might be sought.

31. In addition, one mine operator has recently sought declaratory relief from the Federal Mine Safety and Health Review Commission on these very issues. MSHA opposed that request, and the Commission as a procedural matter denied the mine operator's request for declaratory relief, and thus did not address the merits of the issue of how 30 C.F.R. Part 40 should be interpreted in circumstances very similar to those here. *See Secretary of Labor v. MidContinent Resources,* 12 FMSHRC Dec. 949 (May 23, 1990) (Exhibit 17). Further, the Commission has also specifically ruled that although it has authority to issue declaratory relief in certain circumstances, it has no authority to issue declaratory relief where no citation has been issued against the mine operator and then challenged by the mine operator. *Kaiser Coal Corp. v. Secretary of Labor,* 10 FMSHRC Dec. 1165, 1170-1171 (Sept. 27, 1988) (Exhibit 18). In-

deed, in *Kaiser Coal Corp.,* the Commission stated it has no jurisdiction to resolve the issue here because to resolve the dispute both the LMRA and the Mine Act must be construed. *Id.* at 1169.

32. Thunder Basin thus has no remedy before the Federal Mine Safety and Health Review Commission which would allow for a determination of the dispute between it and MSHA whereby Thunder Basin could avoid the risks of enforcement action, either civil or criminal, by MSHA, and avoid waiving its rights under the LMRA.

33. Thunder Basin is entitled to a hearing on the merits of its position in this matter. Thunder Basin has no source of redress before MSHA or the Federal Mine Safety and Helath [sic] Review Commission or any other forum than this Court for a hearing on the merits of its dispute with MSHA. To force it to choose between waiving its clear rights under the LMRA or to risk significant penalties is fundamentally unfair and a denial of due process of law.

CLAIM FOR RELIEF
(DECLARATORY AND INJUNCTIVE RELIEF)

34. Thunder Basin incorporates paragraphs 1 through 33 herein.

35. An actual controversy exists between Thunder Basin and Defendants concerning MSHA's failure to recognize and accept the decision of the overwhelming majority of Thunder Basin's employees under the LMRA to reject the UMWA as their representative and MSHA's failure to apply its regulations in a way consistent with the rights of employees and employers under the LMRA.

36. In ignoring the LMRA in interpreting the term "represents" in 30 C.F.R. § 40.1(b)(1), MSHA is improperly interpreting 30 C.F.R. Part 40 and creating a clear conflict with the interpretation and application of the LMRA.

37. Thunder Basin has no adequate legal or administrative remedy. Unless this Court awards declaratory relief, Thunder Basin can only obtain a hearing and a determination of the merits of its objections to MSHA's interpertation of 30 C.F.R. Part 40 by committing a violation of the law (in MSHA's view), and thereby incurring substantial penalties. If Thunder Basin acquiesces in MSHA's interpretation, whether before a citation is issued, or after a citation is issued in order to avoid the risk of per day civil penalties, Thunder Basin will be required to forego its clear statutory rights under the LMRA, without a hearing.

38. MSHA's persistence that Thunder Basin either violate the Mine Act or waive its LMRA rights is a denial of due process of law and thus a violation of the Constitution of the United States.

39. Thunder Basin will suffer immediate, irreparable, and permanent harm if it is required to waive its rights under the LMRA and to accept the interpretation of MSHA recognizing the UMWA as a representative of Thunder Basin's employees in order to obtain a hearing.

WHEREFORE, Thunder Basin respectfully requests that this Court enter an Order

A. Preliminarily and permanently enjoining Defendants from taking, or recommending, any enforcement action, or issuance of penalties or fines, under the Federal Mine Safety and Health Act of 1977 for alleged violations of 30 C.F.R. Part 40 by Thunder Basin, or any of its officers, agents, or directors, because of Thunder Basin's refusal to recognize the United Mine Workers of America as a Representative of Miners, pending a determination on the merits as to whether the United Mine Workers of America can be a proper representative of Thunder Basin's employees without having first been selected by those employees pursuant to the procedures of the National Labor Relations Board;

B. Declaring that denying Thunder Basin a hearing on the merits of its claim that the United Mine Workers of America cannot be a proper representative of Thunder Basin employees under 30 C.F.R. Part 40 without having first been selected by those employees pursuant to the procedures of the National Labor Relations Board is a denial of due process of law and a violation of the Constitution of the United States;

C. Declaring that Defendants' interpretation of 30 C.F.R. Part 40 is improper, and that the United Mine Workers of America cannot be a Representative of Miners at the Thunder Basin Black Thunder Mine unless and until they have been designated as a representative of employees, pursuant to the procedures of the National Labor Relations Board under the Labor-Management Relations Act; and

D. Granting such other and further relief as this Court may deem appropriate.

Respectfully submitted,

SHERMAN & HOWARD

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3000 First Interstate Tower North
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Denver, Colorado 80202
(303) 297-2900

HIRST & APPLEGATE

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AND

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(303) 293-4234

Attorneys for Plaintiff

Address of Plaintiff:

Thunder Basin Coal Company
P.O. Box 406
Wright, Wyoming 82732

STATE OF WYOMING)
) ss.
COUNTY OF CAMPBELL)

J. A. Herickhoff, being first duly sworn, deposes and says: I am the president of the plaintiff corporation, the Thunder Basin Coal Company, named in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing complaint and know the contents thereof and the same are true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true, and except as to paragraphs 26 through 29 which are verified only by Mr. Craig.

/s/ J. A. Herickhoff
J. A. HERICKHOFF

Subscribed and sworn to before me this 11th day of March, 1991.

[SEAL]

/s/ Patricia A. Mahoney
Notary Public in and for
the County of Campbell,
State of Wyoming

My Commission expires: December 19, 1993.

STATE OF WYOMING)
) ss.
COUNTY OF CAMPBELL)

W. L. Craig, being first duly sworn, deposes and says: I am the Manager, Health and Safety of the plaintiff corporation, the Thunder Basin Coal Company, named in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing complaint and know the contents thereof and the same are true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

/s/ W. L. Craig
W. L. CRAIG

Subscribed and sworn to before me this — day of March, 1991.

[SEAL]

/s/ Patricia A. Mahoney
Notary Public in and for
the County of Campbell,
State of Wyoming

My Commission expires: December 19, 1993.

EXHIBIT 2

William A. Holgate
District Manager
CMS&H, District 9
P.O. Box 25367
Denver, CO 80225-0367

Date 10/24/90

Re: Mine Name: ARCO Black Thunder Mine
MSHA ID No.: 48-00977
Operator's Address: PO Box 406
Wright, WY 82732

Dr. [sic] Mr. Holgate:

The following information is being submitted as required by Title 30, Code of Federal Regulations, Section 40.3, which identifies who is to serve as a representative of miners.

A. *Selected Representative of Miners.*

Name: Bob Butero, Int. Rep.

Address: PO Box 3775
Gillette, Wy 82717-3775

Telephone N. (307) 686-9213

Dallas Wolf, Int. Teller
PO Box 3775
Gillette, Wy 82717-3775
(307) 686-9213

B. *Selected Alternate Representative* (Possibly one each shift).

Name	Address	Tele No.
/s/ Loy D. Peters	P.O. 217 Wright, Wy. 82732	464-0728
/s/ Timothy W. Crozier	5407 Raven St. 82716	686-3820
/s/ Thomas M. Wilson	P.O. Box 232 Wright, Wy.	464-0433
/s/ Darryl J. Anderson	Box 87 Wright, Wy. 82732	464-1148

/s/ Darrell D. Ottema	425 Walden Ave. Newcastle, Wy. 82701	746-4190
/s/ Richard D. Shafer	543 Sweetwater Wright, Wyo. 82732	464-1326
/s/ Randall D. Johnson	P.O. Box 1037 Sundance, Wyo. 82729	283-2229
/s/ Donald L. (Greg) Gregory	P.O. Box 942 Newcastle, Wy. 82701	746-3314

C. ☒ Check box if the above selected representatives are representatives for all purposes of relating to the coal act.

E. *If the Representative is Associated with an Organization.*

Organization Name: United Mine Workers of America
Address: 900—15th Street, N.W. Washington, D.C. 20005
Telephone No.: (202) 842-7301

Name and Title of the Official or Position who is to serve as Representative.

Name: Bob Butero
Title: UMWA Int. Saf. Rep.
Address: PO Box 3775 Gillette, Wy 82717-3775
Telephone No.: (307) 686-9213

Name: Dallas Wolf
Title: UMWA Int. Teller
Address: PO Box 3775 Gillette, Wy 82717-3775
Telephone No.: (307) 686-9213

We, the undersigned, have designated the organization and/or those persons listed as designated representatives of the miners. (Two or more miners signatures required.)

/s/ Loy D. Peters Signature	9/26/90 Date		/s/ Darrell D. Ottema Signature	9/26/90 Date	
/s/ Timothy W. Crozier Signature	9/26/90 Date		/s/ Richard D. Shafer Signature	9-26-90 Date	
/s/ Thomas M. Wilson Signature	9-26-90 Date		/s/ Randall D. Johnson Signature	9-26-90 Date	
/s/ Darryl J. Anderson Signature	9/26/90 Date		/s/ Susan Lucero Signature	10-18-90 Date	

F. *Notice to Operator.*

A copy of this letter (and attached authorization) has been delivered to the operator of the Black Thunder mine.

G. *Verification.*

I hereby certify that all information contained herein is true and correct.

/s/ Dallas Wolf
(Signature)

EXHIBIT 6

SAFETY TRAINING CLASSES
TUES. & WED. JANUARY 15 & 16
AT 10AM AND 6PM
AT GRANNIES WEST IN GILLETTE

Due to the success of the Training to date, we are continuing with the process of training as many miners as possible to their rights under MSHA. There has been resistance by the companies in the basin to work with MSHA.

MSHA and the UMWA feel it is imperative that we get this situation in hand. One way is to train miners in their rights under the law. That is why we are offering training in safety and the need for walk around rights with the inspector, as the law states.

The UMWA is offering this training free of charge and/or obligation. We, the Miners for Democracy, need to know as much as we can regarding the safety of our mines. Nobody is out to get anyone, we only want the mines to be as safe as possible.

Nobody but nobody deserves to become a statistic. The latest fatality at a surface mine was in North Dakota in December of 1990. The accident involved the collision of a coal hauler and a scraper, with the scraper operator becoming the fatality.

Whether you are a miners rep now or not, this training is available for everyone. There are no specifications on whom may take the course. If you want to know more about safety or the safety training, you may contact trained Miners Reps or call us at 686-9213.

KNOWLEDGE IS POWER

GET INVOLVED IN SAFETY

SAFETY IS EVERYONES' BUSINESS

EXHIBIT 7

Thunder Basin Coal Company
Post Office Box 406
Wright, Wyoming 82732
Telephone (307) 939-1300

J. A. Herickhoff
President

CERTIFIED #P 114 430 667
RETURN RECEIPT REQUESTED

October 26, 1990

Mr. William A. Holgate
District Manager
CMS&H, District 9
P. O. Box 25367
Denver, Colorado 80225-0367

RE: Thunder Basin Coal Company, Black Thunder Mine
MSHA ID #48-00977

Dear Mr. Holgate:

Attached is a copy of a document Thunder Basin Coal Company received which seeks to designate the United Mine Workers of America, and certain individuals, as walkaround representatives under 30 C.F.R. Part 40. You should be advised that this designation does not, as required by 30 C.F.R. § 40.3(a)(2), provide the name of the mine operator. ARCO does not operate the mine. The mine operator is Thunder Basin Coal Company and the name of the mine is the Black Thunder Mine. Additionally, complete addresses and telephone numbers are not provided for the alternate representatives listed on the form.

For these reasons, the form is invalid and should be returned to the United Mine Workers of America.

I should add that the company has other objections to this designation. Those need not be addressed here pending our first receiving a form containing the information listed in 30 C.F.R. § 40.3(a).

Very truly yours,

/s/ J. A. Herickhoff
J. A. HERICKHOFF

JAH:bc

Attachment

EXHIBIT 8

UNITED MINE WORKERS OF AMERICA
P. O. Box 3775
Gillette, Wyoming 82717
Phone (307) 686-9213

October 25, 1990

Mr. William A. Holgate
District Manager
CMS&H, District 9
P.O. Box 25367
Denver, CO 80225-0367

Dear Mr. Holgate:

As you know we have trained and established miners reps under the Act at Kerr McGee, Jacobs Ranch Mine ID #48-00997, and at ARCO, Black Thunder Mine ID #48-00977.

Jacobs Ranch Mine management has not posted the notice as required under part 40.4 of the Federal Register. Therefore, we request action on this problem as soon as possible, and to be informed on the results of your action.

Our goal is safety at the mines in the Basin. To achieve this goal we have established a training program for miners. The training is done by our International Safety Representative for this area. We are training miners in all aspects of the law and their rights under the law. It is imperative that we recognize and support the miners who have taken the initiative to learn the law and apply it for the benefit of their fellow miners.

Sincerely,
Dallas Wolf

/s/ Dallas Wolf
International Teller/Organizer

cc: Safety Commitees Jacobs Ranch and Black Thunder mines

Joe Hain, Safety Director United Mine Workers of America

Richard Kirkpatrik, Region IV Director UMWA

Robert Butero, International Safety Representative UMWA

G. Paul Anderson, Gen Manager Jacobs Ranch Mine

James A. Herickhoff, General Manager Black Thunder Mine

EXHIBIT 9

William A. Holgate
District Manager
CMS&H, District 9
P.O. Box 25367
Denver, CO 80225-0367

Re: Mine Name: Thunder Basin Coal Co.
Black Thunder Mine

MSHA ID No.: 48-00977

Operator's Address: PO Box 406
Wright, WY 82732

Dr. [sic] Mr. Holgate:

The following information is being submitted as required by Title 30, Code of Federal Regulations, Section 40.3, which identifies who is to serve as a representative of miners.

A. *Selected Representative of Miners.*

Name:	Bob Butero, Int. Rep.
Address:	PO Box 3775 Gillette, Wy 82717-3775
Telephone N.	(307) 686-9213
Name:	Dallas Wolf, Int. Teller
Address:	PO Box 3775 Gillette, Wy 82717-3775
Telephone N.	(307) 686-9213

B. *Selected Alternate Representative* (Possibly one each shift).

Name	Address	Tele No.
/s/ Loy D. Peters	P.O. 217 Wright, Wy. 82732	464-0728
/s/ Timothy W. Crozier	5407 Raven St. 82716	686-3820
/s/ Thomas M. Wilson	P.O. Box 232 Wright, Wy.	464-0433
/s/ Darryl J. Anderson	Box 87 Wright, Wy. 82732	464-1148
/s/ Darrell D. Ottema	425 Walden Ave. Newcastle, Wy. 82701	746-4190
/s/ Richard D. Shafer	543 Sweetwater Wright, Wyo. 82732	464-1326
/s/ Randall D. Johnson	P.O. Box 1037 Sundance, Wyo. 82729	283-2229
/s/ Donald L. (Greg) Gregory	P.O. Box 942 Newcastle, Wy. 82701	746-3314

C. ☒ Check box if the above selected representatives are representatives for all purposes of relating to the coal act.

EXHIBIT 10

Thunder Basin Coal Company
Post Office Box 406
Wright, Wyoming 82732
Telephone (307) 939-1300

J. A. Herickhoff
President

Certified P 553 188 202

November 29, 1990

William Holgate, District Manager
Mine Safety and Health Administration
District #9
Coal Mine Safety and Health
P.O. Box 25367, DFC
Denver, CO 80225

Dear Mr. Holgate:

On November 28, we received the attached single page document from the United Mine Workers of America (UMWA) which purports to name the United Mine Workers of America and its employees, Messrs. Butero and Wolf as the representative of miners under the Federal Mine Safety and Health Act of 1977.

The attempted designation is invalid for two reasons:

1. In 1987, the United Mine Workers of America caused a representation election to be held at Thunder Basin Coal Company for the purpose of attempting to have themselves designated under the Labor Management Relations Act as the authorized bargaining representative for the entire Thunder Basin work force. The results of the election (56 for, 307 against) demonstrated an overwhelming rejection of the UMWA as the representative of our work force. No representation

election has been held since and, in our view, this result continues to fairly reflect the feeling of our work force concerning the UMWA.

There are 17 mines in the Wyoming Powder River Basin. None of those mines are represented by the UMWA even though the UMWA maintains an office in the Wyoming Powder River Basin. Thus, UMWA's presence in the area is solely for the purpose of furthering its own interest in soliciting and obtaining additional union members and seeking to represent the work force at Thunder Basin Coal Company and other area mines.

The Tenth Circuit Court of Appeals in a recent case in which the UMWA participated, recognized that where the Mine Act's provisions for designating miner representatives are misused, "the solution is for the operator to take action against individual instances of abuse when it discovers them". *Utah Power & Light Co., v. Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990). The Mine Act's miner representative designation process is being abused in any instance in which that process is part of an effort to assist organizing efforts. That is clearly the case here.

While the Tenth Circuit was less than clear as to what action should or may be taken in any particular instance, we believe that fairness and justice require that we point out to you immediately the flagrant misuse of the Mine Act in this instance. Further, and in view of the Tenth Circuit's Decision, MSHA has the obligation to make inquiry and determination that any designation of non-employees under 30 C.F.R. Part 40 is done in a manner which does not contravene the holding in the Tenth Circuit case before it takes any action to enforce that purported designation.

2. The second reason the attempted designation is invalid is somewhat technical. You will recall that I returned to you, as invalid, an earlier attempted UMWA designation consisting of two pages. This time I received only one page and since no signature page was sent, I have no way of knowing whether a new form with the proper company name was signed, whether all that was done is to change the first page, or whether the second and any additional pages were not included through inadvertence.

   If the initial form was simply altered without new signatures being obtained then the form is improper. Given the apparent identity of the handwritten portion of the enclosed page with the first page of the prior attempted designation, I certainly question whether a new form was signed as required. Additionally, even if new signatures were obtained, we still have not received the full form.

   Finally, there is nothing to show that the information contained in the attached was certified as required by 30 C.F.R. § 40.3(a)(7)

In view of the above, the attempted designation is invalid and the paper recently received is hereby returned to you.

Very truly yours,

/s/ J.A. Herickhoff
J.A. HERICKHOFF

JAH/sh

Attachment

cc: W.J. Tattersall, Assistant Secretary of Labor
Mine Safety and Health Administration
4015 Wilson Blvd.
Arlington, VA 22203
Certified P 553 188 203

EXHIBIT 11

March 1, 1991 CONFIDENTIAL

Mr. Joe Pavlovich
Sub-District Manager
CMH&S [sic] District #9
P.O. Box 817
McAlester, Oklahoma 74502-0817

Dear Mr. Pavlovich:

I enjoyed having dinner with you on February 26, 1991 at the Prime Rib Restaurant in Gillette, Wyoming.

During our discussions, you asked if we posted our original notice of Representative of Miners that listed two UMWA employees as the designated miner's representative. My response was that we had not received a valid copy to post.

In follow-up to our conversation, I've checked our files and found that we have not received a valid designation listing UMWA officials as the designated representative of miners for our employees.

We originally received a two page designation from the UMWA on October 24, 1990 that listed an incorrect mine name. At that time, our President and General Manager, Mr. Jim Herickhoff, sent a letter to MSHA District Manager, William Holgate (dated 10-26-90), stating that the designation was defective and enclosing the two pages received from the UMWA. Mr. Holgate responded to that letter and confirmed that the designation was in fact defective.

On November 28, 1991, we received an invalid single page document which seemed to name the UMWA as a designated representative. Again, Mr. Herickhoff responded by sending the attached letter to Mr. Holgate.

At this time, we have not received a response from Mr. Holgate.

We have received and posted three other Part 40 designations. These include designees Everett Kraft (dated 12-2-90), Ray McIntosh (dated 12-4-90), and Butch Knutson (dated 12-11-90).

On MSHA's last inspection, at our mine, your Field Supervisor/Inspector, Mr. Joe Ferguson, requested and was accompanied by a designated representative of miners.

In short, we have posted all valid Part 40 "Miner's Representative" designations that have been received.

Sincerely,

/s/ W. L. Craig
W. L. CRAIG
Manager, Health & Safety

Attachment

EXHIBIT 12

Coal Mine Safety Administration
P.O. Box 817
McAlester, Oklahoma 74502-0817

[SEAL]

December 6, 1990

MEMORANDUM FOR: WILLIAM A. HOLGATE
District Manager

FROM: JOSEPH W. PAVLOVICH
Subdistrict Manager

SUBJECT: Request to Initiate Action Concerning Daily Assessment for an Unabated Violation

On October 25, 1990, Inspector Jimmie Giles issued a citation at the Jacobs Ranch Mine, ID No. 48-00997, as a result of a 103(g) request. The citation, No. 3242337, was issued for the operator's failure to post a listing of the representatives of the miners on the mine bulletin board. Giles informed the operator that he had 15 minutes to post the listing to terminate the citation. The operator refused to post the listing saying he would not acknowledge those persons as representatives. After the expiration of reasonable time, Giles issued 104(b) Order No. 3242337 for failure to abate. This was issued as a "no area affected" closure order. The operator still refused to post the listing and has maintained this position as of this date.

Shortly after the order was issued, both Jerry Taylor, District 9 engineering coordinator, and myself were contacted by William Murray, vice president of underground mining for Kerr-McGee Coal Corporation, concerning the citation and order. Each of us informed Mr. Murray independently that no area of the mine would be closed and production would not be affected, but that MSHA could

propose a daily penalty of up to $1,000 per day for failure to abate the 104(b) order.

On a subsequent phone conversation, again with Mr. Murray, he informed me of his intention to request a Health and Safety Conference and an expedited hearing with the Commission to request vacating the citation and order. I informed Mr. Murray that if he was following that action, a daily penalty probably would not be imposed but that the district could still maintain that option. I also informed you of this conversation and a discussion I had with Rick High and Vernon Weaver of the Arlington Assessment Office concerning the daily penalty.

On November 9, 1990, I conducted a Health and Safety Conference with Mr. Murray; Ron Crispin, Manager; and Lenny Altenberger, Safety Director. The labor representatives were notified and were contacted on the telephone during the conference. The operator had no new information to present at the conference and stated they would probably pursue an expedited hearing request. All aspects of the violation were upheld. The management representatives contended that they had no intention of recognizing the representatives or posting the lists to terminate the 104(b) order. I once again informed them of the potential for a daily penalty.

* * * *

[Material redacted by MSHA]

* * * *

I feel this turn of events shows this operator's lack of respect for this regulation and is intentionally designed to dispute and threaten MSHA's authority. I am now facing the possibility of having an outstanding 104(b) order at an active producing coal mine for several months, possibly even exceeding one year, with no effort of the operator to correct the condition. I would ask that the district take action to begin imposition of the daily penalty under Section 110(b) of the Act at a

rate commensurate with the operator's adamant posture toward refusal to correct the practice. This operator is attempting to place MSHA in the middle of its problems with labor, and its attitude reflects the position that enforced portions of the regulations which do not cease or hinder production need not be followed.

Please contact me concerning your opinion of this matter or any additional information needed.

EXHIBIT 13

U.S. DEPARTMENT OF LABOR
Mine Safety and Health Administration
P.O. Box 25367
Denver, Colorado 80225-0367
Coal Mine Safety and Health
District 9

[SEAL]

CMS&H Memo No. D9-00-91-055

December 14, 1990

MEMORANDUM FOR: JERRY L. SPICER
Administrator
for Coal Mine Safety
and Health

FROM: /s/ William A. Holgate
WILLIAM A. HOLGATE
District Manager

SUBJECT: Imposition of Daily Penalty Under Section 110(b) of the Act, Jacobs Ranch Mine, I.D. No. 48-00997 Kerr-McGee Coal Corporation

It is recommended that the maximum allowable daily penalty, under Section 110(b) of the Mine Act, be imposed upon Kerr-McGee Coal Corporations Jacobs Ranch Mine, for failure to terminate order number 3242340.

The operator's continuous refusal to comply with the order demonstrates an apparent defiance to MSHA's enforcement sanctions. Attached are the citation, order and other related documentation to support this action.

If you have any questions regarding this matter, please contact my office at FTS: 554-5458.

Attachments

cc: Margaret Miller, SOL

EXHIBIT 14

U.S. DEPARTMENT OF LABOR
Office of the Solicitor
1961 Stout Street
Denver, Colorado 80294
(303) 844-5521
FTS: 564-5521

Telecopier
(303) 844-6603
FTS: 564-6603

December 21, 1990

Charles W. Newcom
Sherman & Howard
3000 First Interstate Tower Bldg.
633 17th St.
Denver, CO 80202

Re: Kerr-McGee Coal Company

Dear Mr. Newcom:

This letter is to inform you that the Coal Mine Safety and Health Administration, District 9, has proposed to the MSHA assessment office that Kerr-McGee be fined $1000.00 per day penalty for failing to abate the citation and order issued to it in October. It is MSHA's position that Kerr-McGee is blatantly ignoring the agency's order to abate the citation and is spurning the authority vested in MSHA by Congress. The Act is clear that citations must be abated in a reasonable time, or a fine may be imposed.

The proposal has been sent to the office in Arlington and you should receive a letter from them in a short time explaining the imposition of the penalty. I have not seen a copy of the letter, nor do I know its contents, I am writing simply as a courtesy to let you know the status of

MSHA's action in this matter. The assessment office is not obligated to follow the recommendation and may give Kerr-McGee additional time to abate.

If you have any questions about this matter, I would be happy to discuss it with you.

Sincerely,

Henry C. Mahlman
Associate Regional Solicitor

By /s/ Margaret A. Miller
MARGARET A. MILLER
Attorney

EXHIBIT 15

U.S. Department of Labor

[SEAL]

Mine Safety and Health Administration
P.O. Box 25367
Denver, Colorado 80225-0367
Coal Mine Safety and Health
District 9

January 2, 1991

Mr. David B. Richardson
Supervisor of Safety
Jacobs Ranch Mine
Kerr-McGee Coal Corporation
Caller Box 3013
Gillette, Wyoming 82716

Re: Penalty Provisions of Section 110(b)

Dear Mr. Richardson:

I am writing to express the Mine Safety and Health Administration's (MSHA) concern with Kerr-McGee's refusal to properly post the designation of officials of the United Mine Workers of America (UMWA) as representative of miners at your Jacobs Ranch Mine. As you know, the UMWA has been designated under 30 CFR Part 40 to serve as representative of miners for health and safety purposes under the Federal Mine Safety and Health Act of 1977 (Mine Act).

MSHA issued Citation No. 3242337 on October 25, 1990, and, after a reasonable abatement period, issued a Section 104(b) order. It is MSHA's statutory responsibility to require compliance with all of its orders. Your continued noncompliance has led me to consider this violation for the civil penalty provisions of Section 110 (b) of the Mine Act, which authorizes a daily civil penalty. I hope that this sanction will not be necessary.

I understand your reasons for noncompliance, and while I recognize your desire to protect your interests in the labor relations area, I must insist upon compliance with the citation and order issued on October 25, 1990. If you have not abated this violation within 24 hours of receipt of this letter, I will recommend implementation of a civil penalty, under Section 110(b) of the Mine Act, for each day that a failure to correct the cited violation continues.

I trust that I have made our position clear. If you have any questions, please contact me at (303) 231-5458.

Sincerely,

/s/ Jerry K. Taylor *for*
William A. Holgate
District Manager

EXHIBIT 16

KERR-McGEE COAL CORPORATION
Caller Box 3013
Gillette, Wyoming 82717-3013

January 3, 1991

Mr. William A. Holgate
District Manager
Coal Mine Safety & Health District 9
Mine Safety and Health Administration
U.S. Department of Labor
P.O. Box 25367
Denver, Colorado 80225-0367

Re: Citation No. 3242327—Order No. 3242340

Dear Mr. Holgate:

We are in receipt of your letter of January 2, 1991. As your letter required, we have today posted the designation of miners' representative which Kerr-McGee Coal contends is defective and improper under law. We post this designation under strong protest.

The decision to post this designation was reluctantly taken in light of the 24-hour demand in your January 2nd letter, and communications from the Solicitor's office that District 9 had requested penalties of $1,000 per day for each day the Company continued to fail to post the disputed designation of representative.

Kerr-McGee Coal will continue to vigorously pursue relief from the citation and order based on the improper designation of UMW officials and their alternates.

Very truly yours,

Kerr-McGee Coal Corporation

/s/ G. Paul Anderson
G. PAUL ANDERSON
General Manager
Jacobs Ranch Mine

GPA/dfs

PER 6-1
xc: Jimmie Giles (Hand Delivered)
C. B. Hendricks, Esq.
C. W. Newcome [sic], Esq.

[EXCERPTS FROM TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION]

* * * *

[68] MR. NEWCOM: Let me just check my notes, Your Honor. I might just reflect in the interest of the record, Your Honor, since we don't have extra copies, I believe the letter that Mr. Herickhoff referred to earlier I think is Exhibit either B or C to the Secretary's brief in response to our motion.

THE COURT: Very well.

MR. NEWCOM: We would stipulate to the admission [69] of the exhibits attached to the Secretary's memorandum.

MS. MILLER: I'm sorry?

MR. NEWCOM: I was just indicating, Peggy, to the Court that the letter to which Mr. Herickhoff having received—

MS. MILLER: Is attached to our—

MR. NEWCOM: I think it's either B or C. I don't recall.

MS. MILLER: It's C, and that would be fine, Your Honor.

MR. NEWCOM: And we'll stipulate to the admissibility of A through—

MS. MILLER: D.

MR. NEWCOM: To the exhibits attached to her—

THE COURT: The exhibits attached to the Secretary's response may also be received.

(Defendant's Exhibits A through D received in evidence.)

* * * *

[89] JOSEPH PAVLOVICH

called as a witness on behalf of the Defendant, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

Q. (BY MS. MILLER) Will you state your full name and spell your last name, please?

[90] A. My name is Joseph William Pavlovich, P-A-V-L-O-V-I-C-H.

Q. And your address, Mr. Pavlovich?

A. My business address is Post Office Box 817, McAlester, Oklahoma.

Q. Mr. Pavlovich, you are currently employed with the Mine Safety and Health Administration; is that correct?

A. Yes, I am.

Q. How long have you been employed with the Mine Safety and Health Administration?

A. Approximately 15 years.

* * * *

Q. What's your present position with MSHA?

[91] A. I'm the sub-district manger [sic] in McAlester, Oklahoma.

Q. Would you tell us, please, what the sub-district manager does for MSHA?

A. I'm responsible for health and safety inspections and investigation activities at coal mines that are located in 14 states west of the Mississippi.

Q. Does that included [sic] Wyoming?

A. Yes, it does include Wyoming.

* * * *

[117] CROSS-EXAMINATION

Q. (BY MR. NEWCOM) You've talked about the amount of time Kerr-McGee was given in order to post once they got the citation. That was 15 minutes, wasn't it?

A. Yes, sir.

Q. You also indicated that, in fact, Kerr-McGee never got a daily penalty, and the reason they didn't get a daily penalty is rather than risk the thousand-dollars-a-day threat, they posted it; isn't that right?

A. That is correct.

Q. And to be sure that I'm correct, Mr. Pavlovich, as to how you envision the Act operating, if no relief is granted by this Court that would prevent a citation from being issued, if Thunder Basin doesn't post the disputed UMWA designation, step 1 is they'll be issued a citation; isn't that right?

A. That is correct.

Q. And they'll be given some period of time, maybe more than 15 minutes, maybe less, to post; isn't that right?

A. It would be a reasonable period of time, yes, sir.

Q. If they don't post it, then they'll be subject to a [118] 104(b) order for failure to abate; isn't that correct?

A. That is correct.

Q. And at that point, unless they choose to pursue expedited litigation on a four-day notice with no discovery and any real opportunity to prepare, if they don't take that expedited litigation route, then the next step will be, as you described to us with Kerr-McGee, they're going to be threatened with daily penalties; isn't that right?

A. I won't say that necessarily is correct.

Q. But certainly, that's what you yourself did—

A. Yes, sir, I did.

Q. —as manager for that mine, which you're also the manager here.

A. Yes.

Q. When there was an expedited litigation, you proposed daily penalties.

A. Yes, I did.

Q. And ultimately, I think that led to Exhibit 15, excuse me, going to Kerr-McGee saying post in 24 hours or the penalties start running; isn't that right?

A. Yes, sir, that is the letter that was sent to Kerr-McGee.

Q. Then in Exhibit 16, in fact, Kerr-McGee responded and said "Okay, we'll post"; isn't that correct?

A. Yes.

* * * *

[LETTER FROM WILLIAM HOLGATE TO J. A. HERICKHOFF]

EXHIBIT C

Coal Mine Safety & Health
District Nine

March 11, 1991

J. A. Herickho.., President
Thunder Basin Coal Company
P. O. Box 406
Wright, Wyoming 82732

Re: Black Thunder Mine
ID No. 48-00977
Representative of Miners

Dear Mr. Herickhoff:

I apologize for the delay in replying to your letter of November 29, 1990, regarding the representative of miners at the subject mine. Your concerns stated in the letter regarding the validity of the representative of miners have been noted.

It should be pointed out that the walkaround rights prescribed in Section 103 (f) of the Federal Mine Safety & Health Act of 1977 (Mine Act), extends to miners' representatives who are *not* employees of the mine operator. This is a well-established matter of law, *Utah Power & Light Co., v. Secretary of Labor,* 897 F. 2d (10th Cir. 1990).

Also, it has been MSHA's position in prior court and commission cases, that an operator's general belief that a representative employed by a union will use his access to the mine for union organizing purposes, is irrelvant [sic] to the exercise of Mine Act rights. It is clear that the right of the miners' representative, to participate under Section 103 (f) of the Mine Act, is not an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants. The right is one limited to travel and participate with the MSHA inspector in the safety and health inspection of the mine.

The MSHA inspector controls the inspection, and it is the inspector's responsibility to ensure that the miners' representative activities are limited to aiding the inspection and not to engage in other unrelated activities.

The information submitted by Mr. Dallas Wolf on October 24, 1990, was returned to him because it contained errors regarding the names of the mine and the company. A subsequent submittal from Mr. Wolf was correct, and was placed on file at the District Office. This subsequent submittal was duly signed by Mr. Wolf, and was correctly completed as per the requirements of 30 CFR, Part 40. It was certified by Mr. Wolf as per 30 CFR, Section 40.3 (a)(7). Proper signatures have been placed on the necessary forms. It is the responsibility of the miners' representative to provide a copy of the information to the operator, and it is the operator's responsibility to post the information. (Refer to 30 CFR, Part 40, Sections 40.2 (a) and 40.4)

On January 29, 1991, Mr. Wolf was notified, in writing, acknowledging his submittal regarding miners' representatives at the subject mine. A copy of Mr. Wolfs' [sic] submittal, and a copy of our acknowledgement letter is enclosed for your information and use.

Once again, I am sorry for the delay in replying to your letter. If you have any questions regarding this matter, contact this office at 303/231-5462.

Sincerely,

William A. Holgate
District Manager

Enclosure

bcc: Health File
Sheridan FO
MSDO
EC File
D-9 Chron
Herickof.f:Miller